

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
T-Mobile and the Pierce Archery Proposed Antenna)	
Tower,)	FCC File No. 0001315120
8067 Maddock Road)	NEPA # 42198
North Ridgeville, Ohio 44039)	Call Sign KNLG796 (BTA 084)
)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: November 26, 2003

Released: November 26, 2003

By the Deputy Chief, Spectrum and Competition Policy Division, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. In this Order, we grant an Application for Wireless Radio Station Authorization (“Application”) filed on May 20, 2003, by VoiceStream PCS II License Corporation (“VoiceStream” or “T-Mobile”)¹ for a proposed 145-foot monopole communications tower, FCC File No. 0001315120. VoiceStream filed an Environmental Assessment (“EA”) with the application, pursuant to Sections 1.1308 and 1.1311 of the Commission’s rules.² On June 19, 2003, Mr. Larry Kane, on behalf of himself, certain residents of North Ridgeville, Ohio, certain members of the North Ridgeville Historical Society and certain members of the Audubon Society of Greater Cleveland (collectively “Petitioners”), filed a Petition to Deny, contending that the EA is insufficient to establish that the proposed tower will have no significant impact on the environment, and therefore the grant of the Application and construction of the tower would be inconsistent with the Commission’s environmental rules³ implementing the National Environmental Policy Act of 1969 (“NEPA”).⁴

2. As discussed below, we find that the EA establishes that the proposed tower will have no

¹ VoiceStream PCS II License Corporation is ultimately held by T-Mobile USA, Inc., formerly known as VoiceStream Wireless Corporation. The name changed on August 30, 2002.

² 47 C.F.R. §§ 1.1308 and 1.1311.

³ 47 C.F.R. §§ 1.1301 – 1.1319.

⁴ 42 U.S.C. §§ 4321-4395 (1997).

significant impact on the environment, and that Petitioners' objections are wholly without merit. Therefore, we deny the Petition to Deny, issue a Finding of No Significant Impact to the Environment ("FONSI") and grant VoiceStream's Application.

II. BACKGROUND

3. From the summer of 2001 through the spring of 2002, VoiceStream participated in a number of public hearings before the Planning Commission, Zoning Board and Municipal Council of North Ridgeville, at which the corporation discussed the feasibility of a number of different sites for the location of a tower. Mr. Larry Kane, representing himself and other local residents, presented concerns about impacts to property values and environmental issues to these local governmental bodies. On May 10, Mr. Kane, on behalf of more than 300 petitioners, filed a petition with the Commission requesting an order to require the preparation of an EA or environmental impact statement ("EIS") for the Pierce Archery site in accordance with the Commission's rules section 1.1307(c).⁵

4. On June 6, 2002, the City of North Ridgeville issued an 18-month Project Permit to VoiceStream for the construction of a communications tower at 8067 Maddock Road. As the foundation was being laid, Mr. Kane notified the Commercial Wireless Division ("CWD")⁶ that T-Mobile had begun work before the petition for EA had been addressed. The Division instructed VoiceStream on June 14, 2002, to immediately halt construction until the environmental concerns could be investigated and resolved.⁷ The Division established a pleading cycle on Mr. Kane's petition to require an EA, and VoiceStream filed an opposition on August 14, 2002. Mr. Kane replied to the opposition on August 29, 2002, and filed an erratum on September 1, 2002.

5. On May 20, 2003, T-Mobile filed an Application and EA addressing the potential environmental impact of the proposed tower. This action elicited the filing of the Petition to Deny by Petitioners on June 19, 2003, which raised many of the same issues presented in Mr. Kane's earlier pleadings. T-Mobile filed a timely opposition to the petition on July 24, 2003,⁸ to which Petitioners replied on August 1, 2003.

III. DISCUSSION

6. Under the Commission's rules, an applicant is required to file an EA for an action that may have a significant environmental impact as defined in Section 1.1307 of the rules.⁹ The EA shall explain the environmental consequences of the proposal and set forth sufficient analysis for the Bureau or Commission to determine whether the proposal will or will not have a significant environmental impact.¹⁰

⁵ 47 C.F.R. § 1.1307(c).

⁶ On November 24, 2003, the infrastructure deployment functions of the CWD were transferred to the Spectrum and Competition Policy Division ("SCPD") as part of the reorganization of the Wireless Telecommunications Bureau. As used herein, the term "Division" refers interchangeably to CWD before the reorganization or SCPD after the reorganization.

⁷ Letter from CWD to Kane, June 14, 2002.

⁸ The time for filing an opposition to the petition was extended due to irregularities in the service of process,

⁹ 47 C.F.R. §§ 1.1307, 1.1308(a); *see also* 47 C.F.R. § 1.1312(b) (if a facility for which no pre-construction authorization is required may have a significant environmental impact, the licensee or applicant shall prepare an EA and environmental processing shall be completed prior to the initiation of construction).

¹⁰ 47 C.F.R. § 1.1308(b); *see also* 47 C.F.R. § 1.1311 (setting forth required contents of an EA).

If the Bureau or Commission determines, based on an independent review of the EA, that the proposal would not have a significant impact, it will issue a FONSI.¹¹ In this case, we find, for the reasons discussed below, that the EA establishes that the proposed tower will not have a significant environmental impact. We further find that the conclusory allegations in the Petition to Deny do not show any significant environmental impact. We therefore conclude that the record supports issuance of a FONSI.

A. Documentation in Support of a FONSI

7. Upon evaluating the information included in the EA pursuant to Section 1.1311 of the Commission's rules, we determine that the proposed tower will not have a significant impact on the environment. In particular, the EA includes information and documentation for each of the potential environmental impacts as to which the Commission's rules require routine evaluation.¹² With respect to several of these potential impacts, there are no circumstances that would trigger our review. Specifically, there is documentation to establish that: the tower will not be located in an officially designated wilderness area (1.1307(a)(1)) or wildlife preserve (1.1307(a)(2));¹³ the State Historic Preservation Officer for Ohio concurs that there are no properties listed or eligible for listing on the National Register of Historic Places within the area of potential effects (1.1307(a)(4));¹⁴ there has been no indication from the federally recognized tribes contacted that there would be a significant impact on Indian religious sites (1.1307(a)(5));¹⁵ because the tower will be lower than 200', no lighting is required by Federal Aviation Administration regulations (1.1307(a)(8));¹⁶ and the proposed facility will be operated at all times in accordance with all applicable FCC regulations and guidelines governing maximum permissible exposure to radiofrequency ("RF") emissions (1.1307(b)).¹⁷

8. With respect to effects on threatened and endangered species, T-Mobile supplied a letter from the Fish and Wildlife Service of the U.S. Department of Interior (FWS) concurring that no endangered or threatened species or critical habitat will be affected as long as the applicant complies with one condition (1.1307(a)(3)).¹⁸ Specifically, FWS requires that no potential roost trees for the Indiana bat will be cut between April 15 and September 15 of any year.¹⁹ We include this restriction in the FONSI and attach it as a condition to the license.

9. Although the utility trench for the proposed tower will be installed in a flood plain, T-Mobile documents that the utility lines will be buried as not to impede the flow of water and thus not to

¹¹ 47 C.F.R. S 1.1308(d).

¹² See 47 C.F.R. § 1.1307(a), (b).

¹³ EA at 7-8.

¹⁴ *Id.* at 10-12.

¹⁵ *Id.* at 12-13.

¹⁶ *Id.* at 15.

¹⁷ *Id.* at 15.

¹⁸ *Id.* at 8-10. See U.S. Fish & Wildlife Concurrence Letter (March 4, 2002).

¹⁹ FWS also recommends that in order to protect the Massasauga Rattlesnake, a species that is a candidate for listing as a threatened species, T-Mobile conduct a 40-hour survey and, if any of the species are determined to be present, refrain from construction when air temperature is over 65 degrees and from habitat-disturbing maintenance activities from November 15 to March 15.

significantly affect the environment (1.1307(a)(6)).²⁰ Finally, although the site is in an area designated as a wetland, the U.S. Army Corps of Engineers (USACE) has indicated that because it occupies an area of less than 0.1 acres, it falls below the threshold for requiring a permit (1.1307(a)(7)). However, T-Mobile is required to notify the USACE of the finished dimensions of the site once the project is fully constructed. This requirement is noted in the FONSI. The proposed construction will result in no other change in surface features.

B. Issues Raised by Petitioners

10. Petitioners raise a broad variety of grounds on which they assert an EIS is required for this tower. As discussed below, none of these allegations comes close to establishing that the construction will have a significant impact on the environment.

1. Subject Tower Constitutes a Source of Controversy

11. Petitioners assert that local governmental bodies charged with overseeing land use in North Ridgeville did not operate in a manner to fully address local controversy.²¹ However, the record indicates that there were a number of opportunities for Petitioners to speak at public meetings before the Planning Commission, the Zoning Board and the City Council. Although there may have been some confusion as to the authority of the zoning board to grant variances on non-residential property, the workings of local government are not reviewed by the Commission. Furthermore, the existence of controversy does not, in itself, mean that a project will have a significant environmental impact. Although controversy regarding an issue that is relevant to the existence of a significant environmental impact may be a factor in favor of preparing an EIS, mere controversy in the absence of such a legitimate issue is not.²²

2. Effect on Endangered Species

12. Although Petitioners assert that T-Mobile's review for effect on endangered species was cursory,²³ FWS accepted its report. Although FWS found the report was insufficient to establish that Indiana bats are not present, it found that a limitation on cutting trees would adequately ensure that this species would not be affected.²⁴ Petitioners present no evidence to rebut FWS' conclusion.

13. Petitioners also assert that the tower may have an effect on the bald eagle, and that T-Mobile should be required to determine and disclose the location of a nearby bald eagle nest. However, FWS has determined that the precise location of the nest is irrelevant because the tower will not affect the eagles'

²⁰ *Id.* at 13-14. The access road to the tower also crosses a flood plain, but it is already existing and its contours will not be changed. The tower site itself is not in a flood plain.

²¹ Petition to Deny at 1; Reply at 3.

²² *See* Friends of the Ompompanoosuc v. FERC, 968 F.2d 1549, 1557 (2nd Cir. 1992) (holding that an EIS would be needed if "a substantial dispute exists as to the size, nature, or effect of the major federal action."); *see also* Indiana Forest Alliance, Inc v. United States Forest Service, 325 F.3d 851, 858 (7th Cir. 2003) (establishing "a two-step approach to determining whether an agency has acted arbitrarily or capriciously in deciding not to prepare an EIS in the face of *scientific controversy*" (*italics added*)).

²³ Petition at 2-4; Reply at 2.

²⁴ *See* n. 15, *supra*.

life-supporting habits (feeding, nest building, reproduction) or pose a threat of collision.²⁵

3. Exposure to RF Emissions

14. Petitioners argue that emissions from antennas to be located on the tower may have an adverse effect on health and safety, and specifically that these emissions may interfere with a nearby resident's pacemaker. With respect to the general argument, T-Mobile has provided sufficient assurance that its operations will not expose anyone to RF emissions that exceed the guidelines in the Commission's rules.²⁶

With respect to the pacemaker, because the antennas will be mounted more than 100' above grade and the person with the pacemaker lives at least 400' from the base of the tower, any electro-magnetic interference would be negligible. We note that a Food and Drug Administration study has found that mobile phones do not have adverse effects on pacemakers at a distance of more than six inches,²⁷ and exposure to emissions from a base station antenna at the distances involved here would be significantly less than at six inches from a mobile phone.

4. Effect on Historic Properties

15. Petitioners assert that the tower will have an adverse effect on the District No. 8 schoolhouse, a property eligible for listing on the National Register of Historic Places. We note that section 106 of the NHPA and section 1.1307(a)(4) of the Commission's rules apply to properties eligible for listing on the National Register as well as those currently listed. However, the District No. 8 schoolhouse lies outside the area of potential effects established by the Ohio SHPO and Petitioners have provided us with no evidence to call the Ohio SHPO's judgment into question. Thus, the proposed tower cannot have an adverse effect on the schoolhouse.

5. Other Issues

13. We have reviewed in full the other arguments raised by Petitioners and find none of them sufficient to raise a possibility of significant environmental impact. For example, Petitioners make only speculative, general allegations that antenna structures kill migratory birds, without any specific showing how this particular tower would cause harm.²⁸ Similarly, Petitioners' assertions of cumulative impacts do not relate to this specific tower, but consist of conclusory statements about the proliferation of antenna structures generally. Petitioners' other arguments are similarly conclusory.

IV. CONCLUSION

14. Upon reviewing the EA, Petition to Deny, and responsive pleadings, we conclude that Petitioners have failed to present sufficient facts and/or arguments to support their claims that the subject tower will have a significant impact on the environment. Therefore, we deny the Petition to Deny, issue the FONSI, grant the Application, dismiss as moot Mr. Kane's petition to require an EA, and rescind the

²⁵ EA at 9-10.

²⁶ 47 C.F.R. § 1.1310.

²⁷ See <http://www.fda.gov/cdrh/ost/section4.html>

²⁸ See Friends of the Earth, Inc. and Forest Conservation Council, Inc., *Memorandum Opinion and Order*, 17 FCC Rcd. 201 (CWD 2002), *app. for review denied*, FCC 03-277 (released November 10, 2003).

June 2002 order to stop work.

V. ORDERING CLAUSES

15. Accordingly, IT IS ORDERED that, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. §154(i), and Sections 1.939(b) and 1.1313(a) of the Commission's Rules, 47 C.F.R. §§ 1.939(b) and 1.1313(a), the Petition to Deny filed by Petitioners on June 19, 2003 IS DENIED.

16. IT IS FURTHER ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. §154(i), the regulations of the Council on Environmental Quality, 40 C.F.R. §§ 1501.3, 1508.9 and 1508.13, and Sections 1.1308 and 1.1312 of the Commission's Rules, 47 C.F.R. §§ 1.1308 and 1.1312, that the Division finds grant of the Application will have no significant impact on the environment.

17. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and 309(a) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 309(a), and Section 90.149 of the Commission's rules, 47 C.F.R. § 90.149, that the application for Wireless Radio Station Authorization, filed by T-Mobile, IS GRANTED.

18. IT IS FURTHER ORDERED, pursuant to Sections 1501.4(i) and 1506.6 of the regulations of the Council on Environmental Quality, 40 C.F.R. §§ 1501.4(i) and 1506.6, and Section 1.1308 of the Commission's Rules, 47 C.F.R. § 1.1308, that applicant T-Mobile is to provide to the community to be served by this facility notice of the finding herein of no significant impact.

19. IT IS FURTHER ORDERED that due to the subsequent filing of an EA, Mr. Kane's petition of May 10, 2002, requesting an order that VoiceStream file an EA or EIS IS DISMISSED AS MOOT.

20. IT IS FURTHER ORDERED that the Division's letter of June 14, 2002, requiring VoiceStream to halt construction of the tower IS RESCINDED.

21. This action is taken pursuant to delegated authority under Section 0.331 of the Commission's rules, 47 C.F.R. § 0.331.

FEDERAL COMMUNICATIONS COMMISSION

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